(FEDERAL MARITIME COMMISSION)
(SERVED APRIL 15, 1987)
(EXCEPTIONS DUE 5-7-87)
(REPLIES TO EXCEPTIONS DUE 5-29-87)

FEDERAL MARITIME COMMISSION

NO. 86-28

AGREEMENT NO. 003-010965 - ISLAND OCEAN TERMINAL AGREEMENT

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1. This is an investigation pursuant to sections 15 and 22 of the Shipping Act, 1916, to determine whether the subject Agreement should be approved, disapproved or modified; the Agreement is between three vessel operating ocean common carriers engaged in the domestic offshore trade between the United States mainland and Puerto Rico. The Agreement pertains only to the terminal operations and related services in Puerto Rico of these carriers, and does not pertain to ocean freight rates; nor does it pertain to intermodal through rates between inland United States mainland points and ports in Puerto Rico.

2. At the prehearing conference, upon request, it was decided to handle this proceeding in two parts, with the first part concerned with only the issue of the jurisdiction of the Federal Maritime Commission.

3. Found, that the Federal Maritime Commission has jurisdiction both in personam over the proponents (Puerto Rico Maritime Shipping Authority, Trailer Marine Transport Corporation and Sea-Land Service, Inc.) and over the proposed terminal activities of proponents as contemplated in the subject agreement.

Mario F. Escudero and Dennis N. Barnes for proponent, Puerto Rico Maritime Shipping Authority.
William H. Fort for proponent, Trailer Marine Transport Corporation.
Stuart Breidbart and Claudia E. Stone for proponent, Sea-Land Service, Inc.
Rick A. Rude for protestants, Marine Transportation Services Sea Barge Group, Inc., and Gulf Puerto Rican Transport, Inc.
Joaquin A. Marquez for protestant, the Puerto Rican Manufacturers Association.
Seymour Glanzer and Paul J. Kaller as Hearing Counsel.

INITIAL DECISION[1] IN PART, LIMITED TO THE ISSUE OF JURISDICTION, OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

INTRODUCTION.

By order of investigation served October 28, 1986, the Federal Maritime Commission instituted this investigation pursuant to sections 15 and 22 of the Shipping Act, 1916 (the Act) to determine whether Agreement No. 003-010965 should be approved, disapproved or modified.

The name of the agreement is the "ISLAND OCEAN TERMINAL AGREEMENT" (IOTA). The agreement will be called IOTA or the Agreement.

The subject Agreement is one between the Puerto Rico Maritime Shipping Authority (PRMSA), Trailer Marine Transport Corporation (TMT) and Sea-Land Service, Inc. (Sea-Land), ocean common carriers, the proponents. The proponents also operate marine terminals and related facilities at ports in Puerto Rico, and provide containers, chassis and related equipment.

The purpose of the Agreement is to promote for all shippers of property to and from ports in Puerto Rico "equality of treatment and uniformity of practice involved in the efficient use of terminal facilities and water-carrier provided transportation equipment in the island of Puerto Rico."

The Agreement pertains to the terminal operations and related services of the proponent carriers at ports in Puerto Rico. Among other provisions, the Agreement provides for the discussion by the proponents,

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

and the agreement by them, upon uniform charges for demurrage, free time, and storage of cargo at ports in Puerto Rico.

Protestants are the Marine Transportation Services Sea Barge Group, Inc., Gulf Puerto Rican Transport, Inc., and the Puerto Rican Manufacturers Association.

The informal protests of the protestants are not part of the formal record so far adduced in this proceeding. Thus, the Administrative Law Judge is not aware of protestants' position(s) on the merits of this proceeding.

The parties have submitted a "Stipulation of Matters Regarding Jurisdiction of the Commission."

At the prehearing conference held in this proceeding the parties jointly urged, and it was decided to handle this matter in two separate parts, with the first part concerned only with the issue of jurisdiction over the proponents, and their proposed activities under the Agreement. For various reasons, counsel jointly requested and obtained postponements of the briefing schedule on the issue of jurisdiction to and including April 1, 1987.

The Commission's order of investigation provides that the initial decision of the Administrative Law Judge be issued by October 28, 1987.[2] The initial decision which follows is concerned only with the issue of jurisdiction.

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[2] The second phase, or merit phase, of this investigation, if and when it proceeds, presumably will entail discovery procedures, the introduction of evidence, and a briefing schedule, which no doubt will make the timely issuance of a second phase Initial Decision by October 28, 1987, a matter of urgent cooperation by all parties.

The present and recent past services provided by the proponents herein in the Puerto Rico Trade have, in largest part, been pursuant to intermodal Interstate Commerce Commission tariffs.

Additionally, PRMSA transported 977 revenue containerloads of cargo in its fiscal year 1986 under its port-to-port F.M.C. tariff FMC-F No. 8 between Puerto Rico and the U.S. Virgin Islands. PRMSA also held itself out under its United States Mainland-Puerto Rico, port-to-port tariff, FMC-F No. 9 to transport boats, vehicles and other heavy lift items. During fiscal year 1986, PRMSA's best estimate is that this port-to-port traffic between the mainland United States and Puerto Rico was one percent or less of its 126,000 revenue containers transported in PRMSA's domestic offshore intermodal trade between Puerto Rico and mainland United States points.

TMT offers port-to-port service between Puerto Rico and the U.S. Virgin Islands under its tariff, FMC-F No. 11, and in the past 12 months carried 2,157 revenue trailer loads of cargo in this trade. TMT carried 93,779 revenue trailer loads of cargo under its intermodal I.C.C. tariff in the past twelve months.

Sea-Land carried in the last twelve months about 964,000 revenue tons in its intermodal domestic offshore I.C.C. tariffed trade. Sea-Land also offers port-to-port F.M.C. tariffed service, but transported no cargo pursuant to this tariff in the last twelve months.

ASSUMPTION.

For the purposes of the present decision, limited to the issue only of jurisdiction, it is proper to assume that the purpose of the Agreement is lawful. Suffice it to say, that the proponents here are seeking to

obtain Commission approval of their proposed Agreement for the stated purpose of avoiding chronic malpractices in the trade, which malpractices are alleged to have existed in the trade for many years, longer than the last five or six years.

There is Commission precedent for the subject agreement, inasmuch as in 1969 and 1974 the Commission approved a similar agreement among the then principal carriers in the Puerto Rican trade. Puerto Rico Trades - 1968, 17 F.M.C. 251. The said 1968 Agreement created as a policing agent, the Puerto Rico Ocean Service Association (PROSA), and provided generally for the establishment of self-policing procedures and uniform tariff demurrage rules, etc., not including ocean freight rates, between the then principal carriers serving the trade between the Atlantic and Gulf Ports of the mainland United States and ports in Puerto Rico.

In the above cited case, at pages 256-257, the Commission stated that the record was clear that demurrage practices, congestion, etc., had long been a nagging problem in the Puerto Rico trade; that before PROSA there were serious abuses regarding the collection of demurrage and as Judge Greer found in his initial decision:

> . . . prior to PROSA, demurrage malpractices "abounded." Consignees were accustomed to use the leverage of their ocean freight business to coerce carriers into settling demurrage claims for less than the tariff rate. There was "whipsawing" between carriers.

THE PRESENT AGREEMENT.

The geographic scope of the present Agreement covers terminal facilities and ancillary transportation services provided or rendered by the parties in the island of Puerto Rico in connection with the receipt

and delivery of common carrier cargo, either in the domestic or the foreign trade.

The Agreement insofar as it relates to the foreign trade of the United States and its territories, etc., already has been approved by the Commission. As to foreign commerce the Agreement became effective on August 2, 1987. Thus, this proceeding now is concerned with the Agreement only as it relates to the domestic trade of the United States and its territories.

The Agreement would give the proponents authority to agree upon and to establish certain terminal and accessorial charges, rules, etc., to cooperate in the collection and administration of such charges, rules, etc., and to establish neutral body policing procedures so as to enforce the charges, rules, etc.

The Agreement excludes the establishment and maintenance of ocean freight rates and intermodal through rates.

The Agreement includes the establishment and maintenance of charges, rules, etc. with respect to numerous matters, including but not limited to:

> the loading and unloading of waterborne freight onto and from trucks, lighters, barges, vessels and other modes of transportation;
>
> the storage of waterborne freight in Puerto Rico, in containers or in buildings; and
>
> the fixing of free time, demurrage and other equipment detention charges.

The proponents of the Agreement may appoint a joint agent to bill and collect terminal and accessorial charges.

A terminal tariff containing uniform rules, charges, etc. as may be agreed by the proponents shall be published by an agent in their behalf.

Such tariff shall be concurred in by the proponents, and filed with the Commission.

Minutes of all meetings of proponents regarding the Agreement shall be mailed to the Commission.

Any person subject to the jurisdiction of the Commission who provides ocean carrier terminal services and facilities in Puerto Rico, or who furnishes evidence of ability and intention to do so, may become a party to this Agreement.

Any party to the Agreement may withdraw upon thirty days notice.

The Agreement will promptly and fairly consider shippers' requests and complaints.

Each party to the Agreement has the right to take independent action upon ten days written notice unless a shorter time is agreed.

THE ISSUE OF JURISDICTION IN GENERAL.

Protestants, the Puerto Rico Manufacturers' Association filed no opening, nor reply brief.

The other protestants and Hearing Counsel generally take the position that the proponents are transporting cargo largely or almost entirely under intermodal tariffs filed with the Interstate Commerce Commission (I.C.C.); and that as common carriers or other persons providing terminal services in connection with said intermodal service, the proponents will be, under the Agreement herein, engaged in activities beyond the limit of the proper jurisdiction of the Commission (F.M.C.).

The proponents dispute any inference or conclusion that their Agreement and their activities under the Agreement are in anywise a matter of the jurisdiction of the I.C.C. Also, the proponents insist that their Agreement is one under section 15 of the Shipping Act, and as such is subject to the jurisdiction of the F.M.C.

The proponents do not dispute, the fact that intermodal rates between ports in Puerto Rico, on the one hand, and on the other inland points in the mainland United States, are matters to be filed in tariffs with the I.C.C. under the jurisdiction of the I.C.C.

The proponents point to the distinction between "activities" and "carriers". In Trailer Marine Transport Corp. v. F.M.C., 602 F. 2d 379 (D.C. Cir. 1979) at page 386, the Court stated:

> There is thus no language in the key jurisdictional section of the I.C. Act that warrants intrusion by the I.C.C. into the regulatory domain that Congress expressly conserved for the I.C.C.'s sister agency, the F.M.C., which was established to acquire and exercise[31] a special regulatory expertise over certain water routes.
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> [31] We note, in this context, that the F.M.C.'s preoccupation with an imputed distinction between "F.M.C.-regulated" carriers and "I.C.C.-regulated" carriers is unproductive and misleading. . . . In the case of trade of the type at issue here, there is no such thing as a carrier subject exclusively and invariably to regulation by only one of the two agencies; designation of the appropriate agency to regulate a particular cargo must turn on the destination and routing of cargo to be carried. The factor relevant to a determination of the appropriate agency to exercise jurisdiction over a particular carrier is thus the trade activity rather than the "identity" of the carrier.

Specifically the Court also said, that the I.C. Act confers on the I.C.C. plenary jurisdiction to "require the filing of, and to regulate substantively the tariffs of both the land and sea segments of joint through rail-water routes for the carriage of goods between ports of

Puerto Rico and inland points of the United States." (Emphasis supplied.)

The Court emphasized not regulation of carriers, but the regulation of tariffs of segments of joint through routes. Such tariffs are to be filed with the I.C.C., but where a joint route ends, and the tariff covering the joint through route ends, then we have the end of regulation by the I.C.C.

In connection with intermodal movements, partly by water, and partly by railroad or motor carrier, the Interstate Commerce Act grants the I.C.C. general jurisdiction over the rail carrier or over the motor carrier transportation between a place in the mainland United States and a place in a territory or possession of the United States, but only insofar as such rail carrier or motor carrier transportation takes place within the mainland United States, (sections 1 and 216 of the I.C. Act).

The statute is further clarified. The United States Code, Title 48, covers "Territories and Insular Possessions." This title in its section 751 provides that Subtitle IV of Title 49 shall not apply to Puerto Rico. Subtitle IV of Title 49 was substituted for the Interstate Commerce Act and the several amendments made or to be made thereto on authority of Public Law 95-473, section 3(b), October 17, 1978.

In other words, the Interstate Commerce Act and its amendments do not apply to Puerto Rico. Thus, the I.C.C. clearly lacks jurisdiction over intraterritorial transportation within Puerto Rico, among other matters or things taking place in Puerto Rico.

Under the Agreement now in issue, after cargo arrives in Puerto Rico, or before cargo leaves Puerto Rico, it is true also that the

Interstate Commerce Act does not apply, because I.C.C. jurisdiction insofar as here pertinent covers only matters under the common control, management, or arrangement for continuous carriage, of both a water carrier and a rail or motor carrier.

Since the I.C.C. lacks jurisdiction over terminal activities in Puerto Rico, at the least when these activities are separately tariffed, a next question is whether the F.M.C. has jurisdiction over such terminal activities.

In line with the reasoning of the Court in the Trailer Marine Transport Corp. case, above, the Federal Maritime Commission must determine exactly what activity is to be regulated. The facts are that the subject section-15 Agreement concerns marine terminal activities which will be excluded from the terms of service offered in I.C.C.-filed tariffs.

The I.C.C., as seen, has the power to regulate the tariffs of both the United States mainland land segments and the sea segments of joint through rail-water routes for the carriage of goods between ports of Puerto Rico and inland points of the mainland United States. But, the I.C.C. has no jurisdiction to regulate the activities of water carriers in the domestic offshore trades, when these activities occur before the joint through route begins (northbound from Puerto Rico), or after the joint through route ends (southbound to Puerto Rico).

When do these joint through routes begin and end?

Under the proposed implementation of the proposed Agreements here, service will be as follows:

(A) Southbound, U.S. Mainland-Puerto Rico

1. Cargo will be transported from origin to first place of rest at San Juan terminal in accordance with intermodal tariffs filed at the I.C.C., using freight bills which show only San Juan as the destination terminal.

2. After arrival at first place of rest in San Juan, handling of cargo and use of containers will be in accordance with the Agreement's terminal tariff published by proponents or by their wholly-owned subsidiary terminal companies. This tariff will be filed at the F.M.C.

(B) Northbound, Puerto Rico-U.S. Mainland

1. Linehaul movement from final place of rest at San Juan terminal to ultimate destination in the mainland will occur under intermodal tariffs filed at I.C.C. using freight bills that show only San Juan as the origin terminal of each shipment.

2. Prior to arrival at final place of rest in San Juan, cargo handling and use of containers will be governed by the IOTA tariff, which will be filed at the F.M.C.

For both southbound and northbound services, the IOTA tariff will provide for certain terminal services and facilities in Puerto Rico, including:

(a) Establishment of container pools;

(b) Free time and demurrage/detention rules and charges relating to use of carrier-supplied equipment and shipper-provided equipment;

(c) Blocking, bracing or protective cover of freight;

(d) Cleanup and disposal of refuse material;

(e) Consolidation of shipments;

(f) Oversized cargo handling;

(g) Extra length and/or wide width cargo handling;

(h) Heavy lift charges;

(i) Free time and demurrage rules and charges on cargo stored at terminal awaiting shipper-consignee disposition;

(j) IOTA terminal tariff undercharges caused by misdescription of cargo by shipper/owner of goods;

(k) Reconsignment or diversion of shipment;

(l) Special services for preparation and distribution of documentation, such as Export Declaration, Shippers' Drafts or Invoices, additional copies of Bills of Lading, etc.;

(m) Storage of transfer cargo picked up at carrier's terminal in other than carrier-supplied equipment;

(n) Weighing and inspection;

(o) Terminal usages charges;

(p) Arrimo charges;

(q) Trailer/container stuffing or unstuffing; and

(r) Pickup and delivery service.

The terms, conditions, and charges governing the terminal services and facilities, listed above will be agreed jointly by the IOTA parties, subject to the right of independent action, and published in a single tariff by a joint tariff agent.

A joint agent to inspect cargo and to bill and collect the terminal and accessorial services charges will be appointed.

The IOTA parties jointly will establish rules governing the extension of credit and payment of claims for cargo loss or damage occurring after the shipment arrives at first place of rest (southbound) or occurring before the shipment arrives at final place of rest (northbound), in connection with the terminal services and facilities provided by the IOTA parties.

As seen above, the proponent ocean carriers, PRMSA, TMT and Sea-Land, intend to so structure their tariffs and their holding-out to the

public, so that separate charges will apply to their transportation and terminal services as between, (1) from inland points in the mainland United States southbound to first place of rest at San Juan, or northbound from final place of rest at San Juan to inland points in the United States mainland, and (2) southbound after arrival at first place of rest in San Juan, or northbound prior to final place of rest at San Juan.

In other words, the terminal and related services in Puerto Rico will not be parts of the through intermodal rates, and so will not be listed in tariffs filed with the I.C.C., covering the through intermodal rates.

These terminal and related services in Puerto Rico under the proposed Agreement will be listed in a tariff filed with the F.M.C.

JURISDICTION OVER THE PROPOSED ACTIVITY COVERED BY THE SUBJECT AGREEMENT.

Assuming for the time being, that the F.M.C. has jurisdiction in personam over the parties to the present Agreement, the Commission must determine whether the Agreement is one under section 15 of the Act. Under the above assumption of in personam jurisdiction, the subject Agreement certainly is one described under section 15 as one controlling, regulating, preventing, or destroying competition . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement, as between common carriers or other persons subject to the Act.

In additional to the terms of section 15, reference should be made to sections 17 and 18(a) of the 1916 Act, by which the F.M.C. is empowered to determine and prescribe just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property by both "other persons" subject to the Act

(section 17) and by common carriers by water subject to the Act (section 18).

Section 15 of the Shipping Act gives the F.M.C. jurisdiction over certain activities of the water carriers, including agreements between such carriers which affect competition. This, of course, includes terminal agreements between these water carriers.

The proponents have structured the Agreement in issue here, so that the matters covered by the Agreement will not be part of any activities (joint through intermodal service) undertaken by proponents jointly with rail carriers or with motor carriers. As seen, the activities under the subject Agreement will not be within the jurisdiction of the I.C.C.

The IOTA parties, proponents, have the right to structure their activities in the Agreement here so that the Agreement shall be within the jurisdiction of the F.M.C. This right derives from the principle that "test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through service." Thompson v. United States, 343 U.S. 549, 557 (1952). The obligations of the carriers, and the consequent regulatory effects thereof, are no more than coextensive with the scope and nature of the transportation services which the carriers choose to offer.

The joint intermodal service tariffs to be filed with the I.C.C. will not hold out transportation which terminates or originates beyond the dock in Puerto Rico. The various terminal charges and accessorial services to be covered by IOTA will be listed in its tariff to be filed with the F.M.C., and these terminal and other services will be performed before or after the joint intermodal service begins or ends.

Planning to achieve regulation of certain activities by the F.M.C. rather than by the I.C.C. is not unlawful, any more than planning to avoid excess taxes by permissible means is unlawful.

Courts have upheld the rights of carriers to structure intermodal operations in the domestic trades to pass from the jurisdiction of one regulatory agency to another. In Sea-Land Service, Inc. v. F.M.C., 404 F. 2d 824 (D.C. Cir. 1968), the water carrier formerly had an F.M.C. tariff that provided local pickup and delivery, and the water carrier was sustained in its switch from F.M.C. jurisdiction to I.C.C. jurisdiction when it restructured its tariff and transportation offerings in the Seattle, Washington, to Anchorage, Alaska, service. At that time Sea-Land filed notice to cancel its F.M.C. tariff, and to change from single (water) carrier service and rates to joint through water carrier and motor carrier service and rates.

Judge Bastian elucidated the Court's concept of jurisdiction in the Sea-Land, Inc. case, above, at pages 826, 827, and 828, stating that jurisdiction depended on the holding out of a joint through rate service participated in by both the water carrier and the motor carrier as evidenced by a joint tariff, and supported by the further fact that both the motor carrier and the water carrier jointly and severally assumed responsibility for the performance of the services in issue.

By contract, in the present case and under the Agreement now in issue, there will be no joint tariff, and there will be no joint assumption of responsibility. In fact, the holding out will be under a tariff where only a single carrier (the water carrier) will offer the service, and only a single carrier (the water carrier) will take the responsibility.

Judge Bastian went on to state that we perceive no diminution in F.M.C. jurisdiction as a result of our decision today, because our decision is confined to joint through services.

IN PERSONAM JURISDICTION.

The proponents point out that the stipulation by the parties of "Matters Regarding Jurisdiction of the Commission" includes the facts that PRMSA is owned by the Commonwealth of Puerto Rico, and that PRMSA operates a common carrier service between the mainland United States and Puerto Rico, among other services; that TMT operates common carrier services between the Atlantic and Gulf Coasts of the mainland United States and Puerto Rico, among other services; and that Sea-Land is a common carrier in the domestic offshore trade and in the foreign trade, and that Sea-Land serves Puerto Rico as part of its Americas Division.

Proponents state that a common carrier, for Shipping Act purposes, is at common law a person who holds itself out expressly or by course of conduct to accept goods for transportation by water from whomever offered.

Each proponent common carrier herein is engaged in the transportation by water of property from the mainland United States to Puerto Rico.

Section 1 of the Shipping Act provides, in part, that the term "common carrier by water in interstate commerce" means one engaged in the transportation by water of property on regular routes from port to port between one state of the United States and a territory or possession of the United States.

The parties differ on the significance of "on regular routes from port to port."

Protestants and Hearing Counsel appear to emphasize that the tariff service offered by a common carrier determines whether or not this common carrier is operating as a common carrier in interstate commerce. In other words, protestants and Hearing Counsel appear to argue that unless only a tariffed port-to-port service is offered, only then is the provider of such service a common carrier under section 1 of the Act.

On the other hand, the respondents argue that the legislative history of the words "on regular routes from port to port" shows these words were in 1916 and now are intended only to clearly distinguish common carriers from "tramps".

Tramps do not operate over regular routes with regularly scheduled calls; rather tramps, for example, go from port A to port B to port C to port D to port B to port X, as sporadic business dictates.

Common carriers, in contrast, for example, go back and forth between ports A and B on regular schedules, generally regardless of the ups and downs of cargo loads. In other words, common carriers operate over regular routes.

Legislative history supports the argument of the proponents, that the 1916 legislation was amended following debate in the Senate, with the purpose of excluding tramp vessels from rates and other regulation by the United States Shipping Board.

Furthermore, and more importantly, the law must be read reasonably, and must not produce strained interpretations.

When the words of the statute are read in their ordinary meanings, common sense tells one that a common carrier by water engaged in the transportation by water cannot transport except over water. What does this mean? It means that common carriers by water can only transport

over water from port to port. No ship can transport goods overland by use of its ships. The F.M.C. has jurisdiction in personam over common carriers by water because such carriers are engaged in transportation by water on regular routes. This in personam jurisdiction is not lost because these common carriers also may make tariff arrangements jointly with rail carriers or with motor carriers.

To the extent that a common carrier by water may offer joint service in its joint tariffs (joint with rail carriers or joint with motor carriers), this joint tariff service can in no wise mean that the water carrier on its own or by itself is providing transportation other than by water from port to port.

Likewise, it would be illogical to argue that the rail carrier or the motor carrier by itself, or on its own, would be providing transportation by water.

Therefore, it is concluded that PRMSA, TMT, and Sea-Land insofar as they provide the water leg of a joint tariff service between inland United States points and ports in Puerto Rico, yet are common carriers by water in interstate commerce as defined in section 1 of the 1916 Act. These proponents still are providing transportation by water over regular routes from port to port, as distinguished from tramps which do not operate over regular routes, but operate port to port albeit over sporadic routes or schedules.

CONCLUSIONS.

It is ultimately concluded and found that the Federal Maritime Commission has jurisdiction in personam over the three proponents, PRMSA, TMT and Sea-Land, as common carriers by water engaged in transportation

by water of property on regular routes from port to port, subject to the Shipping Act; and that the Federal Maritime Commission also has jurisdiction over the proposed terminal activities to be provided by the proponents under a separate single-mode water-carrier tariff filed with the Federal Maritime Commission in accordance with the subject Agreement herein. Further it is ultimately concluded and found that the subject Agreement is one subject to the jurisdiction of the Federal Maritime Commission under section 15 of the Shipping Act. This decision relates only to the issue of jurisdiction, and not to the merits of the subject Agreement.

C. E. Morgan

Charles E. Morgan
Administrative Law Judge

Washington, D. C.
April 13, 1987

(S E R V E D)
(March 25, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-28

AGREEMENT NO. 003-010965
ISLAND OCEAN TERMINAL AGREEMENT

The Federal Maritime Commission has in personam jurisdiction over Puerto Rico Maritime Shipping Authority, Trailer Marine Transport Corporation and Sea-Land Service, Inc., parties to Agreement No. 003-010965, by virtue of a limited amount of port-to-port traffic they carry as common carriers in interstate commerce between ports in the United States and Puerto Rico and between ports in Puerto Rico and the Virgin Islands.

The Federal Maritime Commission has subject matter jurisdiction over Agreement No. 003-010965 to the extent it involves terminal and other accessorial activities performed in connection with port-to-port linehaul transportation.

The Federal Maritime Commission lacks subject matter jurisdiction over Agreement No. 003-010965 to the extent it involves terminal and other accessorial activities performed in connection with joint through rail-water or motor-water transportation between points in the United States and ports in Puerto Rico or the Virgin Islands.

Mario F. Escudero and Dennis N. Barnes for Proponent, Puerto Rico Maritime Shipping Authority.
William H. Fort for Proponent, Trailer Marine Transport Corporation.
Stuart Breidbart and Claudia E. Stone for Proponent, Sea-Land Service, Inc.
Rick A. Rude for Protestants, Marine Transportation Services Sea Barge Group, Inc., and Gulf Puerto Rican Transport, Inc.
Joaquin A. Marquez for Protestant, Puerto Rican Manufacturers Association.
Seymour Glanzer and Paul J. Kaller as Hearing Counsel.

REPORT AND ORDER

BY THE COMMISSION: (Edward J. Philbin, Acting Chairman; James J. Carey, Vice-Chairman; Thomas F. Moakley and Francis J. Ivancie, Commissioners.)

The Federal Maritime Commission ("FMC" or "Commission") instituted this proceeding pursuant to sections 15 and 22 of the Shipping Act, 1916 ("1916 Act" or "Act"), 46 U.S.C. app. §§ 814, 821, to determine whether Agreement No. 003-010965 should be approved, disapproved or modified. The name of the agreement is the "Island Ocean Terminal Agreement" ("IOTA" or "Agreement") and the parties to the Agreement are the Puerto Rico Maritime Shipping Authority ("PRMSA"), Trailer Marine Transport Corporation ("TMT"), and Sea-Land Service, Inc. ("Sea-Land"), (collectively the "Proponents").

The Agreement would permit Proponents to file a common tariff with the FMC setting forth terminal and other accessorial charges, rules, regulations and provisions governing receipt and delivery of cargo at marine terminals in Puerto Rico. The Agreement would also enable Proponents to cooperate in collection of terminal and accessorial charges. Finally, the Agreement would establish a neutral body policing system.

Marine Transportation Services Sea Barge Group, Inc. ("Sea Barge") and Gulf Puerto Rican Transport, Inc. ("GPRT"), and the Puerto Rican Manufacturers Association, which had protested the Agreement when filed with the Commission, were named Protestants in the proceeding.[1] The Commission's Bureau of Hearing Counsel was made a party to the proceeding.

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[1] Sea Barge and GPRT subsequently became signatories to the Agreement and withdrew their protests.

The proceeding was assigned to Administrative Law Judge Charles E. Morgan ("Presiding Officer") for hearings and issuance of an initial decision. At a prehearing conference, the Presiding Officer decided to resolve the issue of FMC jurisdiction over IOTA before considering the Agreement's approvability under the standards of section 15. Subsequently, the parties submitted a stipulation of matters regarding jurisdiction of the Commission ("Stipulation").

In his Initial Decision ("I.D.") on jurisdiction, the Presiding Officer concluded that the FMC has both in personam jurisdiction over carriers serving Puerto Rico pursuant to joint-through intermodal tariffs filed with the Interstate Commerce Commission ("ICC") and subject matter jurisdiction over Puerto Rican terminal services provided in connection with such service. The proceeding is now before the Commission on Exceptions to the I.D. filed by Hearing Counsel.

BACKGROUND

Most of cargo being carried by PRMSA, TMT and Sea-Land in the Puerto Rican trade moves between points in the continental United States and ports in Puerto Rico pursuant to joint-through rail-water or motor-water tariffs filed with the ICC. Rules and charges pertaining to Puerto Rican terminal services provided in connection with this service are currently published in their ICC tariffs.

Additionally, PRMSA transported 1977 revenue containerloads of cargo in its fiscal year 1986 under its

port-to-port tariff, FMC-F No. 8, between Puerto Rico and the U.S. Virgin Islands. PRMSA also held itself out under its United States mainland-Puerto Rico, port-to-port tariff, FMC-F No. 9, to transport boats, vehicles and other heavy lift items. During fiscal year 1986, PRMSA's best estimate is that this port-to-port traffic between the mainland United States and Puerto Rico was one percent or less of its 126,000 revenue containers transported in PRMSA's domestic offshore intermodal trade between Puerto Rico and mainland United States points.

TMT offers port-to-port service between Puerto Rico and the U.S. Virgin Islands under its tariff, FMC-F No. 11, and in the 12 months prior to the hearing carried 2,157 revenue trailer loads of cargo in this trade. TMT carried 93,779 revenue trailer loads of cargo under its intermodal ICC tariff in the twelve month period.

In the same twelve months, Sea-Land carried about 964,000 revenue tons in its intermodal domestic offshore ICC tariffed trade. Sea-Land also offers port-to-port FMC tariffed service, but transported no cargo pursuant to this tariff in the twelve month period.

DISCUSSION AND CONCLUSIONS

It is undisputed that the Commission has jurisdiction over the parties and the Agreement as it relates to terminal and other accessorial services performed in connection with Proponents' FMC-regulated port-to-port service. The jurisdictional issue arises because the Agreement would also

cover such services performed on cargo moving in Proponents' ICC regulated service. This issue is purely a legal one, the parties' Stipulation having eliminated all factual issues relating to jurisdiction.

There are two components to the Commission asserting jurisdiction here. First, the Commission must have personal or in personam jurisdiction over two or more of the parties to the Agreement. Second, the Agreement must fall within the Commission's subject matter jurisdiction, i.e., the Agreement must relate to some aspect of ocean transportation.

1. Personal Jurisdiction.

Proponents' minimal port-to-port service is sufficient to establish FMC in personam jurisdiction over those parties to IOTA. The precedents argued by Hearing Counsel and which we principally rely upon in making that finding are Bethlehem Steel v. Indiana Port Commission, 12 S.R.R. 1059 (1972) ("Indiana Port") and Prudential Lines, Inc. v. Continental Grain Company, 21 S.R.R. 133 (1981) ("Continental Grain").

In Indiana Port, the port had served a "common carrier by water in interstate commerce"[2] on only two occasions. The port moved to dismiss the proceeding on the grounds that this was insufficient to render it an "other person subject to this [1916] act" (hereinafter referred to simply as "other person")[3] citing Fall River Line Pier, Inc. v. International Trading Corporation of Va., Inc., 399 F.2d 413 (1st Cir. 1968) ("Fall River"). The administrative law judge denied the motion stating:

> The Fall River case is not controlling here as the issue decided differed from the issue raised by the present motion. The court was concerned with the question of whether a pier serving both common and contract carriers "is subject to regulation with respect to contract carriage because on a few occasions it also served common carriage." Whether the carriers served were contract or common carriers was an issue. Here, the carriers served by the Port were admittedly common carriers. The finding that the Port served common carriers by water is sufficient to support the Commission's jurisdiction.

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[2] "Common carrier by water in interstate commerce" is defined in section 1 of the 1916 Act, 46 U.S.C. app. § 801, as:

> a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

[3] "Other person subject to this act" is defined in section 1 of the 1916 Act as:

> any person not included in the term common carrier by water, in interstate commerce, carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water in interstate commerce.

12 S.R.R. 1059, 1061. The Commission affirmed the denial of the motion. Bethlehem Steel Corp. v. Indiana Port Commission, 13 S.R.R. 22 (1972). After the Commission found a charge assessed by the Indiana Port Commission to be unlawful under section 17 of the 1916 Act, 46 U.S.C. app. § 816, the court set aside that finding and remanded the case to the Commission with instructions to determine the reasonableness of the charge. Indiana Port Commission v. FMC, 521 F.2d 281 (D.C. Cir. 1975). In its opinion on remand, the Commission reaffirmed its earlier personal jurisdictional ruling but found the particular charge to be unrelated to terminal activities and thus to be outside the Commission's jurisdiction under section 17 of the 1916 Act. This decision was upheld. Bethlehem Steel Corp. v. FMC, 642 F.2d 1215 (D.C. Cir. 1980) per curiam without opinion, Bazelon, J. dissenting.

In Continental Grain, Continental argued that it was not an "other person" because it did not perform terminal services in connection with a "common carrier by water." The complainant in that case, Prudential Lines, Inc., was admittedly a common carrier but carried the grain loaded at Continental's facility pursuant to special contracts. Thus, Continental maintained that, as to the terminal facility, Prudential was a contract carrier. Alternatively, Continental argued that even if carriers such as Prudential were considered common carriers, the amount of their business was not sufficient to make Continental an "other

person." The Commission rejected both contentions. As to the former, the Commission stated:

> [T]he absence of published rates for the carriage of Continental's grain did not alter the common carrier status of the carrier who loaded grain at the N&W Elevator. Because of the exemption from tariff filing requirements contained in Section 18(b)(1) of the Shipping Act, the four carriers were under no obligation to publish rates for the carriage of bulk grain. Nor did such carriage transform them into "contract carriers." (Footnote omitted).

21 S.R.R. 1172, 1175.

Proponents here appear to be in a position analogous to that of the terminal operators in Indiana Port and Continental Grain. While it is true that they handle only a small amount of port-to-port cargo, that amount is sufficient to establish personal jurisdiction. As was the case in Indiana Port and Continental Grain, jurisdiction is not dependent on the amount of cargo handled. Accordingly, the Commission finds personal jurisdiction over Proponents on the basis of their port-to-port service.

Proponents themselves do not, however, rely on their port-to-port service to establish in personam jurisdiction. Their argument in support of such jurisdiction is based instead on the contention that, despite the fact they are required to file their joint-through intermodal tariffs with the ICC, they remain "common carrier[s] by water in interstate commerce" for all other purposes including the regulation of their terminal services.

It is undeniable that each of the Proponents is a "common carrier" at common law. Proponents go further,

however, and cite a number of cases to support their position that the term "common carrier" as used in the Shipping Act, 1916 is a "common carrier" at common law, e.g., Agreement No. 7620, 2 U.S.M.C. 749, 752 (1945); United States v. Stephens Bros. Line, 384 F.2d 118, 121-123 (5th Cir. 1967); Capital Transportation, Inc. v. United States, 612 F.2d 1312, 1317-18 (1st Cir. 1979); and Charging Rates Higher than Tariff, 19 F.M.C. 44, 55 (1975). These cases are not relevant here. They all deal with the issue of whether a given carrier was holding itself out to the public as a common carrier. That is not the issue in this case. Rather, the question is whether the Proponents are "common carrier[s] by water in interstate commerce" (emphasis added) as defined in section 1 of the Act.

Although Proponents physically provide transportation over the water portion of joint-through routes between places in the United States and ports in Puerto Rico, this does not necessarily bring them within the definition of a "common carrier by water in interstate commerce." The court's decision in Sea-Land Service, Inc. v. FMC, 404 F.2d 824 (D.C. Cir. 1968) makes this point. In that case, Sea-Land, a "common carrier by water in interstate commerce" providing transportation between West Coast ports and ports in Alaska, including pick up and delivery within the port, restructured its service as a joint-through service with the motor carrier providing the pick up and delivery and filed the appropriate tariffs with the ICC. In claiming

jurisdiction, the Commission took the position that Sea-Land had not changed its physical operation but had simply changed the nomenclature for the same service in order to bring itself under ICC jurisdiction. The court rejected this proposition, stating:

> This argument is wide of the mark, for it fails to distinguish the legal significance attaching, on the one hand, where Sea-Land assumes exclusive responsibility for the successful performance of door-to-door transportation, and on the other hand, where Sea-Land is a participant with a motor carrier in a joint undertaking. In the latter instance, there is a contract of carriage between both carriers and the shipper (or consignee), and both carriers are jointly and severally liable.

404 F.2d at 828.

Not every carrier that physically provides service between ports in the United States and ports in Puerto Rico can be considered a "common carrier by water in interstate commerce." It is necessary to consider whether the service is part of a joint-through route with a motor or rail carrier. If it is, the water carrier's service cannot be considered one of a "common carrier by water in interstate commerce."

The decisions in Trailer Marine Transport Corporation v. FMC, 602 F.2d 379, 396-7 (D.C. Cir. 1979) and Puerto Rico Maritime Shipping Authority v. ICC, 645 F.2d 1102 (D.C. Cir. 1981) confirm that the Commission cannot parse a domestic joint-through route in order to obtain jurisdiction over the water portion. The Commission's position in those cases was that there was a division of regulatory responsibility between the FMC and the ICC similar to that approved in Commonwealth of Pennsylvania v. ICC, 561 F.2d 278 (D.C. Cir.

1977) with respect to foreign transportation. The court disagreed, concluding that the ICC's assertion of exclusive jurisdiction was appropriate and necessary. If the joint-through service is solely under the jurisdiction of the ICC, the FMC cannot rely upon activities performed by a carrier as a part of that service in order to establish personal jurisdiction over that carrier.

There remains the question of whether Proponents are "common carrier[s] by water in interstate commerce" by virtue of their terminal activities. Proponents assert that terminal activities to be performed in Puerto Rico pursuant to IOTA will not be part of any ICC-regulated joint-through route. While this may remove the basis for ICC jurisdiction, it does not necessarily confer jurisdiction on this Commission. See Totem Ocean Trailer Express v. FMC, 662 F.2d 563 (9th Cir. 1981). The definition of "common carrier by water in interstate commerce" in section 1 of the 1916 Act makes no reference to terminal services. Terminal services are not an element in the definition. Thus, the providing of terminal services, without more, cannot convert one into a "common carrier by water in interstate commerce."

Hearing Counsel maintains that IOTA is in substance an agreement among terminal operators, and therefore one among "other persons" subject to the 1916 Act. In support of this position, Hearing Counsel points out that membership is not limited to "common carriers by water in interstate commerce" but is open to qualifying terminal operators. In addition,

it notes that there is nothing in the Agreement which limits any individual Proponent to the handling of its own cargo.

Proponents on the other hand argue that they cannot be "other persons" because section 1 of that Act defines an "other person" as not included in the term "common carrier by water in interstate commerce". Proponents claim that because they are "common carriers by water in interstate commerce" they cannot be "other persons," at least with respect to their own cargo.

So long as each Proponent handles its own cargo, it cannot be an "other person." If one Proponent handles another's port-to-port cargo, which the Agreement permits, it would be providing terminal services and become an "other person."[4]

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[4] In addition, a terminal operator which serves ICC-regulated carriers operating on the high seas or Great Lakes from port-to-port in interstate commerce is also an "other person" subject to the Commission's jurisdiction. The basis for this is as follows. The definition of "common carrier by water in interstate commerce" contained in section 1 of the 1916 Act originally included any "common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port-to-port between one state . . . of the United States and any other State . . . of the United States . . . ." The Transportation Act of 1940 ("1940 Act") transferred jurisdiction over such carriers from the Commission to the ICC. (The ICC already regulated joint-through rail-water and motor-water arrangements involving intercoastal water carriers. See Commodity Rates Between Atlantic Ports and Gulf Ports, 1 U.S.M.C. 642 (1937) and Motor-Water Commodity Rates Between California and Oregon - Washington, 30 M.C.C. 335 (1941).) This would have removed Commission jurisdiction over terminal operators that exclusively served such carriers but for section 320(b) of the Interstate Commerce Act ("ICA") which stated:

> (b) Nothing in subsection (a) shall be construed to repeal -
>
> * * *
>
> (3) the provisions of the Shipping Act, 1916, as amended, insofar as such Act provides for the regulation of persons included within the term "other person subject to this Act."

However, we are not convinced that a person furnishing terminal facilities to a carrier operating pursuant to a joint-through intermodal arrangement is furnishing terminal facilities to a "common carrier by water in interstate commerce."

At the time the 1916 Act was enacted, the ICC already regulated joint-through water-rail arrangements as rail transportation subject to section 6(11) of the ICA.[5] The Alexander Report which led to the passage of the 1916 Act noted:

> The act of August 24, 1912, providing for the opening, maintenance, protection, and operation of the Panama Canal, contains provisions extending the jurisdiction of the Interstate Commerce Commission over interstate transportation which involves the carriage of property by rail and water, in the following particulars: viz, . . . (2) "to establish through routes and maximum joint rates over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced . . . ."

H.R. Rep. No. 805, 63rd Cong. 2d sess. at 422 (1914). Citing this passage from the Alexander Report, Congress took steps to remove any possible conflict between the jurisdiction of the ICC and the newly created Shipping Board (now the FMC):

> The Interstate Commerce Commission is now vested with some of the powers covered by the recommendations of the committee, and to avoid any possible conflict of jurisdiction section 32 [33] of the bill expressly provides: "That this act shall not be construed to affect the power or jurisdiction of the Interstate Commerce Commission, not to confer upon the board concurrent power or jurisdiction over any matter within the power or jurisdiction of such commission; nor shall this act be construed to apply to intrastate commerce."

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[5] Now 49 U.S.C. § 10503 (1987).

H.R. Rep. No. 659, 64th Cong. 1st sess. at 32 (1916). Having expressed a desire to avoid jurisdictional conflicts, it would have been inconsistent for Congress to include a carrier offering joint-through intermodal service within the definition of "common carriers by water in interstate commerce".

Likewise, there is no reason to assume that a person providing terminal services in connection with such a carrier was intended to fall within the definition of "other person."[6] During the debate that led to the passage of the 1916 Act, Representative Bennet observed that a terminal operator could be subject to regulation by three government agencies:

> In the first place, if he has any rail or other connection with a railroad he is under the Interstate Commerce Commission. If he goes into the Federal warehouse system, he is under the Department of Agriculture. If this bill passes, he is under the shipping board.

53 Cong. Rec. 8276 (1916). The sponsor of the 1916 Act, Representative Alexander, defended the need for terminal operators to be included within the scope of the Act stating:

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[6] Proponents intend to remove all rules and charges pertaining to terminal services from their ICC tariffs and republish them in a terminal tariff filed with the FMC. Assuming arguendo that this is permissible under the ICA, such services would still be "in connection" with the ICC-regulated transportation. Terminal services may be performed "in connection" with a joint-through movement without being part of it. The common law imposes an obligation on carriers to provide reasonable facilities for the loading and unloading of the cargo being transported. The Eddy, 72 U.S. 481 (1866). Terminal services remain an integral part of the carrier's holding out.

> Hence, if the board effectively regulates water carriers, it must also have supervision over all those incidental facilities connected with the main carriers.

In other words, the terminal facilities to be regulated were those connected with the water transportation subject to the 1916 Act. If Congress had intended for the Commission to regulate those providing terminal services in connection with intermodal carriers, it would have said so in no uncertain terms. In the absence of such an expression of congressional intent, we must conclude that Congress intended the Commission to regulate only those terminal activities connected with port-to-port water transportation.

2. Subject Matter Jurisdiction.

The other issue that must be addressed in determining the Commission's jurisdiction over IOTA is whether the terminal and accessorial services to be performed in connection with ICC-regulated linehaul transportation are the types of activities which Congress intended the Commission to regulate under the 1916 Act. It is appropriate therefore to consider provisions of the 1916 Act which make specific reference to such activities. These are sections 14, Fourth, 17 and 18(a) of the 1916 Act, 46 U.S.C. app. §§ 812, 816, and 817. Section 14, Fourth refers to "the loading and landing of freight in proper condition". Section 17 governs the "receiving, handling, storing or delivering of property" by an "other person" while section 18(a) governs the same practices by a "common carrier by water in interstate commerce."

Section 14 is, by its terms, limited to practices "in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and other such port . . . " (emphasis added). It can have no application to terminal or other services in respect to joint-through transportation between a point in the United States and a port in Puerto Rico.

Section 17 of the 1916 Act states:

> Every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. (Emphasis added).

As Proponents point out, the definition of "other person" specifically excludes "common carrier by water in interstate commerce." Assuming Proponents are correct in contending, at least with respect to each carrier's own service, that it is a "common carrier by water in interstate commerce" rather than "other person" subject to the 1916 Act, section 17 could have no application.

Even if Proponents were to perform terminal services in connection with each other's joint-through intermodal service they would not necessarily be subject to section 17. Section 17 only applies to an "other person" which is defined as one "furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water in interstate commerce". (Emphasis added).

Thus, the "regulations and practices relating to or connected with the receiving, handling, storing or delivering of property" to which section 17 refers are only those which are provided in connection with a "common carrier by water in interstate commerce." As discussed previously, this would include water carriers now subject to the Interstate Commerce Act by virtue of the Transportation Act of 1940 as well as FMC-regulated carriers. However, because the definition of "common carrier by water in interstate commerce" is confined to those regulated as water carriers, it does not include joint-through carriage, such as that provided by Proponents, that is regulated as motor or rail transportation by the ICC.

The provisions of section 18(a) of the 1916 Act relating to the terminal practices of "common carriers by water in interstate commerce" appear at the end of a sentence dealing with port-to-port transportation.[7] That placement suggests that Congress intended the FMC to

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[7] Section 18(a) requires:

> That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing or delivering of property. (Emphasis added).

regulate under section 18(a) only those terminal and other services that are performed in connection with the line-haul transportation subject to that section. If a given line-haul transportation is not subject to section 18(a), then terminal and other services performed in connection with that transportation likewise would not be subject to that section. Accordingly, the court's decision in TMT v. FMC holding that the Commission lacks jurisdiction over joint-through transportation between points in the United States and ports in Puerto Rico also bars regulation of terminal services performed in connection with that transportation pursuant to section 18(a).

The foregoing indicates the Commission can regulate only those activities which relate to, or have an effect on, the "receiving, handling, storing or delivering of property" in connection with a "common carrier by water in interstate commerce" as defined by section 1 of the 1916 Act. How much of a nexus is necessary to establish subject matter jurisdiction is an issue that must be addressed on a case-by-case basis with reference to the particular facts present. Recently, in Petchem v. Canaveral Port Authority, 23 S.R.R. 480, 492 (1985), 23 S.R.R. 974, 985 (1986) appeal filed No. 86-1288, (D.C. Cir. May 19, 1986), the Commission found subject matter jurisdiction over the selection of an exclusive tug franchise by the port. The Commission, however, was careful to disclaim any jurisdiction over the tug boat operator itself. The jurisdiction asserted by the

Commission extended only so far as the port's tug franchising activities affected the availability to carriers of the terminal facilities subject to Commission regulation.[8] In contrast, the Commission specifically has disavowed any jurisdiction over terminal activities that have an insufficient connection with matters subject to Commission regulation. Jacksonville Marine Association v. City of Jacksonville, 22 S.R.R. 1287 (1984) and Indiana Port, 12 S.R.R. 1059.

Here, there has been no showing that the activities performed in connection with Proponents' ICC-regulated joint-through service would have any relation to, or effect on "the receiving, handling, storing or delivering of property" in connection with FMC regulated transportation. In the absence of such a showing, we can find no subject matter jurisdiction under sections 17 and 18(a).

Proponents further claim that section 15 confers FMC subject matter jurisdiction over agreements apart from any

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[8] See also Plaquemines Port, Harbor and Terminal District v. Federal Maritime Commission, No. 86-1517, (D.C. Cir. Feb. 2, 1988).

other section of the 1916 Act.[9] While the literal language of section 15 might support this view, there are limits to the Commission's jurisdiction under section 15. Obviously, the Commission cannot assert subject matter jurisdiction over an arrangement among persons subject to the 1916 Act that is entirely unrelated to activities regulated under that Act. See e.g., FMC v. Seatrain Lines, Inc., 411 U.S. 726, 734 (1973).

In the instant case, the Commission's subject matter jurisdiction over IOTA must be limited to terminal and other accessorial services performed in connection with Proponents' port-to-port transportation and activities relating thereto. It has not been shown that such services performed in connection with Proponents' joint-through service have any effect on activities regulated under the 1916 Act. Accordingly, we decline to assert section 15 jurisdiction over IOTA as it relates to services performed in connection with Proponents' ICC regulated joint-through service. Cf. Totem Ocean Trailer Express, Inc. Petition for Declaratory Order, 22 S.R.R. 286 (1983).

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[9] Section 15 provides, in relevant part, that:

> Every common carrier by water in interstate commerce, or other person subject to this Act, shall file immediately with the Commission a true copy, or if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, . . . in any manner providing for an exclusive, preferential, or cooperative working arrangement.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is reversed and set aside to the extent indicated above and affirmed in all other respects.

By the Commission.

Joseph C. Polking
Secretary

(S E R V E D)
(JUNE 29, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

June 29, 1988

NO. 86-28

AGREEMENT NO. 003-010965 - ISLAND OCEAN TERMINAL AGREEMENT

DISCONTINUANCE AS TO ALL ISSUES

In the notice served on June 2, 1988, the parties in this proceeding were requested to advise within 15 days whether any other matters or issues, other than issues of jurisdiction, remained in need of consideration.

Hearing Counsel filed the only response to the notice of June 2, 1988. Hearing Counsel support discontinuance of the proceeding unless the respondents intend to seek approval of the Agreement No. 003-010965 insofar as it relates to matters within the Commission's jurisdiction. Hearing Counsel suggest that the Agreement may be treated as withdrawn and the proceeding discontinued.

The Agreement insofar as it relates to the foreign trade became effective on August 2, 1987. The present proceeding is

concerned with the Agreement only as it relates to the domestic trade of the United States and its territories (Puerto Rico).

Respondents did not respond to the notice served June 2, 1988, and so apparently do not wish to pursue the merits of the Agreement insofar as it relates to the domestic trade. Good cause appearing, the proceeding in No. 86-28 hereby is discontinued.

C. E. Morgan

Charles E. Morgan
Administrative Law Judge

(S E R V E D)
(August 9, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-28

AGREEMENT NO. 003-010965 - ISLAND OCEAN TERMINAL AGREEMENT

NOTICE

Notice is given that the time within which the Commission could determine to review the June 29, 1988, discontinuance in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

Joseph C. Polking
Secretary